

1 NANCY SCHROEDER (SBN 280207)
2 (nancy.schroeder@wilmerhale.com)
3 WILMER CUTLER PICKERING
4 HALE AND DORR LLP
5 350 S. Grand Ave., Suite 2100
6 Los Angeles, CA 90071
7 Telephone: +213 443 5300
8 Facsimile: +213 443 5400

9 LOUIS W. TOMPROS (*pro hac vice*)
10 (louis.tompros@wilmerhale.com)
11 STEPHANIE LIN (*pro hac vice*)
12 (stephanie.lin@wilmerhale.com)
13 WILMER CUTLER PICKERING
14 HALE AND DORR LLP
15 60 State Street
16 Boston, MA 02109
17 Telephone: +1 617 526 6000
18 Facsimile: +1 617 526 5000

WILLIAM C. KINDER (*pro hac vice*)
(will.kinder@wilmerhale.com)
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
Telephone: +1 212 230 8800
Facsimile: +1 212 230 8888

Attorneys for Plaintiff Matt Furie

**IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MATT FURIE,

Plaintiff,

vs.

INFOWARS, LLC; FREE SPEECH
SYSTEMS, LLC,

Defendants.

2:18-cv-01830-MWF-JPR

**PLAINTIFF MATT FURIE'S
STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW
ISO MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: May 6, 2019

Time: 10:00 a.m.

Hon. Michael W. Fitzgerald

Case Filed: March 5, 2018

Trial Date: July 16, 2019

Plaintiff Matt Furie (“Mr. Furie”) seeks summary judgment on Defendants Free Speech Systems, LLC’s and Infowars, LLC’s (collectively, “Infowars”) first, third, fourth, seventh, and eighth affirmative defenses. Pursuant to Local Rule 56-1, Mr. Furie respectfully submits the following Statement of Uncontroverted Facts and Conclusions of Law in support of Mr. Furie’s Motion for Partial Summary Judgment.

I. STATEMENT OF UNCONTROVERTED FACTS

<u>No.</u>	<u>Fact</u>	<u>Evidence</u>
1.	Mr. Furie first published Pepe the Frog in 2003 in an online comic book titled <i>Play Time</i> .	Ex. 3 [Furie Dep. Tr. at 124:16–22]; Ex. 4 at FURIE_INFO_00000037.
2.	Pepe the Frog is typically depicted with large bulging eyes and multiple white dots in his pupils.	Ex. 5 [Allen Dep. Tr. at 139:15–21]; Ex. 6 [David Jones Dep. Tr. at 52:25–54:4]; Ex. 7 [FURIE_INFO_00000812].
3.	Pepe the Frog is typically depicted with reddish brown lips and puffy eyelids.	Ex. 5 [Allen Dep. Tr. at 139:15–21]; Ex. 6 [David Jones Dep. Tr. at 52:25–54:4]; Ex. 7 [FURIE_INFO_00000812].
4.	Pepe the Frog appeared in comic books published by Mr. Furie, titled <i>Boy’s Club</i> , published online and in print beginning in 2005.	Ex. 8 at FURIE_INFO_00001369; Ex. 9 at FSS000329.
5.	Mr. Furie published <i>Boy’s Club 1</i> in print in 2006.	Ex. 10 [FURIE_INFO_00000115–00000137].

6.	Buena Ventura Press published Mr. Furie's comic book, <i>Boy's Club 2</i> , in 2008.	Ex. 11 [FURIE_INFO_00000055–00000077].
7.	Buena Ventura Press published Mr. Furie's comic book, <i>Boy's Club 3</i> , in 2009.	Ex. 12 [FURIE_INFO_00000290–00000312].
8.	Pigeon Press published Mr. Furie's comic book, <i>Boy's Club 4</i> , in 2010.	Ex. 13 [FURIE_INFO_00000143–165].
9.	Fantagraphics Books published a compilation of all of Mr. Furie's <i>Boy's Club</i> comics.	Ex. 14 [FURIE_INFO_00000171–00000261].
10.	The character Pepe the Frog is a chill frog dude who has a lackadaisical attitude and enjoys spending time with his animal roommates.	Ex. 15 at FSS000255; Ex. 16 at FSS000360.
11.	Mr. Furie's <i>Boy's Club</i> comics “celebrated the lifestyle of 20-something bros, capturing their lives full of junk food, catchphrases, and bodily fluids with horrifying and hilarious accuracy.”	Ex. 9 at FSS000329.
12.	Pepe the Frog likes “pop,” “pizza,” and “talking on his cell.”	Ex. 10 at FURIE_INFO_00000121; Ex. 15 at FURIE_INFO_00000256.

13.	Pepe the Frog's signature catch phrase is "feels good man."	Ex. 14 at FURIE_INFO_00000193; Ex. 8 at FURIE_INFO_00001368.
14.	By 2008, Pepe the Frog became a widespread internet meme, appearing throughout social media, online message boards, and other media sources.	Ex. 3 [Furie Dep. Tr. at 148:3–9]; Ex. 8 at FURIE_INFO_00001368–00001371; Ex. 6 [David Jones Dep. Tr. at 50:21—51:5]; Ex. 8 at FURIE_INFO_00001368–00001371; Ex. 18 [FURIE_INFO_00000010–00000011]; Ex. 14 at FSS000189–000208.
15.	Pepe the Frog became a popular internet meme, commonly appearing with his catch phrase "feels good man."	Ex. 18 at FURIE_INFO_00000010.
16.	Pepe the Frog was the most reblogged meme on Tumblr in 2015.	Ex. 19 at FSS000354.
17.	In September 2016, <i>New York Magazine</i> described Pepe as follows: "His name is Pepe. You know Pepe. He's that forest green, anthropomorphic frog with the maroon lips; the one from all the memes."	Ex. 8 at FURIE_INFO_00001368.

18.	The Pepe the Frog meme became commonly referred to as “Pepe the Frog” or simplified to the name “Pepe.”	Ex. 3 [Furie Dep. Tr. at 148:3–9]; Ex. 8 at FURIE_INFO_00001368–00001371.
19.	Mr. Furie licensed his copyrights in Pepe the Frog to Furry Puppet, Bored Teenager, Yesterdays, What Do You Meme, LLC, Wattz Up Power, Inc., FJerry, LLC, Xi’an MOMO IT Limited and RVCA.	Ex. 20 at FURIE_INFO_00000338; Ex. 21 at FURIE_INFO_00000345; Ex. 22 at FURIE_INFO_00000347; Ex. 23 at FURIE_INFO_0000349; Ex. 24 at FURIE_INFO_00000352; Ex. 25 [FURIE_INFO_00000360]; Ex. 26 at FURIE_INFO_00000738; Ex. 27 [Pl.’s March 29, 2019 Supp. Response to Interrogatory 2].
20.	Mr. Furie’s licensees produced various products depicting Pepe the Frog, including plush dolls, mobile applications, and games.	Ex. 20 at FURIE_INFO_00000338; Ex. 21 at FURIE_INFO_00000345; Ex. 22 at FURIE_INFO_00000347; Ex. 23 at FURIE_INFO_0000349; Ex. 24 at FURIE_INFO_00000352; Ex. 25 [FURIE_INFO_00000360]; Ex. 26 at FURIE_INFO_00000738; Ex. 27 [Pl.’s March 29, 2019 Supp. Response to Interrogatory 2].
21.	Toward the end of 2015, white nationalists and members of the alt-right began associating images of Pepe with white supremacist	Ex. 28 at FURIE_INFO_00000093.

1		language and symbols, Nazi	
2		symbols, and other offensive	
3		imagery.	
4	22.	On September 16, 2016, Donald	Ex. 29 at FSS00018.
5		Trump Jr. posted an image to	
6		Instagram that showed Pepe the	
7		Frog standing behind Donald	
8		Trump with characters that	
9		supported Trump's campaign.	
10	23.	On September 27, 2016, the Anti-	Ex. 30 at FURIE_INFO_00000101.
11		Defamation League identified	
12		Pepe the Frog as a hate symbol,	
13		identifying Pepe as a "cartoon	
14		character used by haters on social	
15		media to suggest racist, anti-	
16		Semitic or other bigoted notions."	
17	24.	The misappropriation of Pepe the	Ex. 31 at FURIE_INFO_00000089;
18		Frog by far-right entities harmed	Ex. 3 [Furie Dep. Tr. at 121:20–
19		Furie's ability to license Pepe.	122:12].
20	25.	Mr. Furie registered for a U.S.	Ex. 32 at FURIE_INFO_00000015.
21		copyright in "Boy's Club 1 zine"	
22		on September 1, 2017 bearing	
23		Registration Number VA 2-073-	
24		600.	
25	26.	Mr. Furie registered for a U.S.	Ex. 33 at FURIE_INFO_00000028.
26		copyright in "Play Time" on	
27			

1		September 1, 2017 bearing	
2		Registration Number VA 2-073-	
3		601.	
4	27.	Mr. Furie registered for a U.S.	Ex. 34 at FURIE_INFO_00000113.
5		copyright in “Boy’s Club 1” on	
6		September 1, 2017 bearing	
7		Registration Number VA 2-073-	
8		597.	
9	28.	Mr. Furie registered for a U.S.	Ex. 35 at FURIE_INFO_00000286.
10		copyright in “Boy’s Club 2” on	
11		September 1, 2017 bearing	
12		Registration Number VA 2-073-	
13		603.	
14	29.	Mr. Furie registered for a U.S.	Ex. 36 at FURIE_INFO_00000288.
15		copyright in “Boy’s Club 3” on	
16		September 1, 2017 bearing	
17		Registration Number VA 2-073-	
18		598.	
19	30.	Mr. Furie filed his application for	Ex. 37 at FURIE_INFO_00000835.
20		a U.S. copyright registration in	
21		“Boy’s Club 4” on January 17,	
22		2018 bearing Registration Number	
23		VA 2-086-281.	
24	31.	Mr. Furie registered for a U.S.	Ex. 38 at FURIE_INFO_00000953.
25		copyright in “Boy’s Club	
26		Collective Edition” on September	
27			

1		1, 2017 bearing Registration	
2		Number VA 2-103-877.	
3	32.	Mr. Furie registered for a U.S.	Ex. 39 at FURIE_INFO_00000017;
4		copyright in “Pepe in the Blue	Ex. 1 [FURIE_INFO_00000166]; Ex.
5		Shirt” on September 1, 2017	40 at FURIE_INFO_00000053.
6		bearing Registration Number VA	
7		2-074-461.	
8	33.	Mr. Furie drew “Pepe in a Blue	Ex. 7 [FURIE_INFO_00000812].
9		Shirt” no later than April 12, 2016.	
10	34.	Mr. Furie submitted his drawing	Ex. 41 at FURIE_INFO_00000032;
11		of “Pepe in a Blue Shirt” with his	Ex. 1 FURIE_INFO_00000166]; Ex.
12		copyright application on	48 [Pl.’s Jan. 14, 2019 Response to
13		September 1, 2017.	Interrog. 10].
14	35.	Copyright notices were attached to	Ex. 11 at FURIE_INFO_00000057;
15		each of the originally published	Ex. 12 at FURIE_INFO_00000292;
16		<i>Boy’s Club 2, Boy’s Club 3, Boy’s</i>	Ex. 13 at FURIE_INFO_00000145;
17		<i>Club 3</i> , and the 2016 compilation	Ex. 14 at FURIE_INFO_00000260.
18		of the <i>Boy’s Club</i> comic books.	
19	36.	Beginning in Fall 2017, Mr. Furie	Ex. 42 at FURIE_INFO_00000395;
20		began sending cease-and-desist	Ex. 43 at FURIE_INFO_00000397;
21		letters, Digital Millennium	Ex. 44 at FURIE_INFO_00000399;
22		Copyright Act (“DMCA”) notices,	Ex. 45 at FURIE_INFO_00000403;
23		and filing infringement lawsuits to	Ex. 46 at FURIE_INFO_00000407.
24		enforce his rights in Pepe the	
25		Frog.	

1	37.	On August 7, 2010, an interview	Ex. 47 at FSS000322.
2		for an article by A.J. Mazur, titled	
3		“Q&A with Matt Furie,” was	
4		posted to <i>knowyourmeme.com</i> in	
5		which Mr. Furie was quoted as	
6		saying “I don’t really mind” when	
7		asked “how do you feel about	
8		people remixing your work?”	
9	38.	On July 28, 2016, an article by	Ex. 9 at FSS000333.
10		Sean T. Collins, titled “The	
11		Creator of Pepe the Frog Talks	
12		About Making Comics in the Post-	
13		Meme World,” was posted to	
14		<i>vice.com</i> in which Mr. Furie was	
15		quoted as saying “a lot of people	
16		make a conscious effort to go out	
17		and try and create that kind of	
18		meme success.”	
19	39.	On September 13, 2016, an article	Ex. 8 at FURIE_INFO_00001370.
20		by Abraham Riesman, titled	
21		“What Happens When Hillary	
22		Clinton Calls Your Cartoon Frog	
23		Racist,” was posted to <i>nymag.com</i>	
24		in which Mr. Furie was cited as	
25		saying “his brother showed him	

1		some Google analytics for	
2		mentions of [Pepe the Frog].”	
3	40.	Mr. Furie has repeatedly asserted	Ex. 48 [Pl.’s Jan. 14, 2019 Response
4		his copyrights in Pepe the Frog	to Interrog. 5]; Ex. 42 at
5		through public statements,	FURIE_INFO_00000395; Ex. 43 at
6		licensing to third parties, and legal	FURIE_INFO_00000397; Ex. 44 at
7		action.	FURIE_INFO_00000399; Ex. 45 at
8			FURIE_INFO_00000403; Ex. 46 at
9			FURIE_INFO_00000407; Ex. 49 at
10			FURIE_INFO_00001863; Ex. 50 at
11			FURIE_INFO_00001472; Ex. 51
12			[FURIE_INFO_00001890–
13			00001904]; Ex. 52
14			[FURIE_INFO_00001905–
15			00001924]; Ex. 69 at
16			FURIE_INFO_00012027.
17	41.	Mr. Furie filed this lawsuit on	Ex. 53 [Complaint, Dkt. 1] at cover
18		March 5, 2018.	page.
19	42.	On July 28, 2016, an article by	Ex. 54 [Pl.’s Jan. 14, 2019 Response
20		Sean T. Collins, titled “The	to Request for Admission 12]; Ex. 9 at
21		Creator of Pepe the Frog Talks	FSS000333.
22		About Making Comics in the Post-	
23		Meme World,” was posted to	
24		<i>vice.com</i> in which Mr. Furie was	
25		quoted as saying “[Pepe’s] got,	
26		randomly, a blue shirt and brown	

1		lips, and that's his accepted outfit	
2		now. [T]hat kind of piss[es] me	
3		off about it. Other than that, I	
4		don't really care."	
5	43.	Jon Allen created the first MAGA	Ex. 5 [Allen Dep. Tr. at 20:8–9,
6		Poster in January 2017.	23:11–13].
7	44.	The MAGA Posters depict Pepe	Ex. 2 [Allen_Furie_0000033]; Ex. 5
8		the Frog in the upper left corner.	[Allen Dep. Tr. at 139:15–21].
9	45.	Mr. Allen created the image of	Ex. 5 [Allen Dep. Tr. at 25:19–26:3,
10		Pepe the Frog in the MAGA	31:5–32:6].
11		Posters by finding an image of	
12		Pepe the Frog on Google, and then	
13		drawing on top of that image using	
14		Adobe Illustrator.	
15	46.	Mr. Allen intentionally made the	Ex. 5 [Allen Dep. Tr. at 139:15–21,
16		image of Pepe the Frog in the	129:19–23]; Ex. 53 [Complaint, Dkt.
17		MAGA Posters recognizable as	1, Ex. B1] at 25, 26, 38, 39.
18		Pepe the Frog.	
19	47.	Mr. Allen offered the MAGA	Ex. 5 [Allen Dep. Tr. at 20:10–11,
20		Posters to Infowars to sell on the	48:22–23]; Ex. 55
21		Infowars online store.	[Allen_Furie_0000036].
22	48.	Free Speech Systems, LLC is the	Ex. 6 [David Jones Dep. Tr. at 13:22–
23		operating business for the media	14:9].
24		platform known as "Infowars."	

49.	Free Speech Systems, LLC owns and operates the websites through which MAGA Posters was sold.	Ex. 56 [FSS Amended Answer to Second Amended Complaint, Dkt. 69] at ¶ 24.
50.	Alex Jones believed MAGA Posters would be a popular item of sale for Infowars's customers.	Ex. 57 [Alex Jones Dep. Tr. at 30:19–24].
51.	Infowars offered MAGA Posters for sale through its online store.	Ex. 58 at FSS000001; Ex. 59 at FURIE_INFO_00000079; Ex. 60 at FURIE_INFO_00000085; Ex. 57 [Alex Jones Dep. Tr. at 48:23–49:7]; Ex. 61 [Infowars's Dec. 7, 2018 Supp. Response to Pl.'s Interrog. 6].
52.	Infowars promoted MAGA Posters on <i>The Alex Jones Show</i> and on the Infowars website.	Ex. 53 [Complaint, Dkt. 1, Ex. B1] at 18–20; Ex. 57 [Alex Jones Dep. Tr. at 49:16–18, 50:21–51:5]; Ex. 61 [Infowars's Dec. 7, 2018 Supp. Response to Pl.'s Interrog. 6]; Ex. 17 [FSS004872–004875].
53.	Multiple Infowars customers recognized Pepe the Frog in MAGA Posters and commented on Pepe's inclusion.	Ex. 53 [Complaint, Dkt. 1, Ex. B1] at 25, 26, 38, 39.
54.	Alex Jones recognized the image of Pepe the Frog in a MAGA Poster when he saw the poster for the first time.	Ex. 57 [Alex Jones Dep. Tr. at 30: 21–24].

55.	Infowars generated revenues totaling \$31,407.44 from selling various iterations of MAGA Posters.	Ex. 61 [Infowars's Dec. 7, 2018 Supp. Responses to Pl.'s Interrog. 3].
56.	Mr. Furie did not enter into a license agreement with either Infowars or Jon Allen for the use of the image or character of Pepe the Frog.	Ex. 5 [Allen Dep. Tr. at 36:1–5]; Ex. 6 [David Jones Dep. Tr. at 136:12–14].
57.	Mr. Furie never offered a license for his copyrights in Pepe the Frog to Infowars.	Ex. 6 [David Jones Dep. Tr. at 136:4–11].
58.	Infowars never accepted an offer from Mr. Furie for a license for his copyrights in Pepe the Frog.	Ex. 6 [David Jones Dep. Tr. at 136:4–11].
59.	Infowars has never communicated with Mr. Furie.	Ex. 57 [Alex Jones Dep. Tr. at 80:22–81:6]; Ex. 6 [David Jones Dep. Tr. at 135:8–21]; Ex. 3 [Furie Dep. Tr. at 192:19–20].
60.	Infowars never contacted, or even attempted to contact, Mr. Furie to obtain a license in Pepe the Frog.	Ex. 3 [Furie Dep. Tr. at 192:19–20]; Ex. 57 [Alex Jones Dep. Tr. at 80:22–81:6]; Ex. 6 [David Jones Dep. Tr. at 135:8–21].
61.	Infowars did not ask Mr. Furie to create Pepe the Frog.	Ex. 6 [David Jones Dep. Tr. at 135:22–24].

62.	Mr. Furie never made an offer to Infowars for a license in Pepe the Frog.	Ex. 6 [David Jones Dep. Tr. at 136:4–11]; Ex. 57 [Alex Jones Dep. Tr. at 80:24–25].
63.	Mr. Furie has never communicated in any way with any person from Infowars.	Ex. 3 [Furie Dep. Tr. at 192:19–20]; Ex. 57 [Alex Jones Dep. Tr. at 80:22–81:6]; Ex. 6 [David Jones Dep. Tr. at 135:8–21].
64.	Infowars never negotiated with Mr. Furie for the rights to use the image of Pepe the Frog in the MAGA Posters.	Ex. 3 [Furie Dep. Tr. at 192:19–20]; Ex. 57 [Alex Jones Dep. Tr. at 80:22–81:6]; Ex. 6 [David Jones Dep. Tr. at 135:8–21].
65.	Mr. Furie’s statements in media interviews on which Infowars relies for its affirmative defenses do not describe the terms of a potential copyright license in the image or character of Pepe the Frog.	Ex. 62 [Infowars Amended Answers to SAC, Dkt. 70] at ¶¶ 37–39; Ex. 63 [FURIE_INFO_00000989–00000992]; Ex. 15 [FSS000254–000258]; Ex. 22 [FSS000328–000338]; Ex. 64 [FSS000345–000352].
66.	Mr. Furie’s statements in media interviews do not describe payment of licensing fees in exchange for a license in the image or character of Pepe the Frog.	Ex. 62 [Infowars Amended Answers to SAC, Dkt. 70] at ¶¶ 37–39; Ex. 63 [FURIE_INFO_00000989–00000992]; Ex. 15 [FSS000254–000258]; Ex. 22 [FSS000328–000338]; Ex. 64 [FSS000345–000352].

67.	Mr. Furie's statements in media interviews on which Infowars relies for its affirmative defenses do not include promises from Mr. Furie regarding a license in the image or character of Pepe the Frog.	Ex. 62 [Infowars Amended Answers to SAC, Dkt. 70] at ¶¶ 37–39; Ex. 63 [FURIE_INFO_00000989–00000992]; Ex. 15 [FSS000254–000258]; Ex. 22 [FSS000328–000338]; Ex. 64 [FSS000345–000352].
68.	Mr. Furie's statements in media interviews on which Infowars relies for its affirmative defenses do not identify any person or entity as a potential licensee for the image or character of Pepe the Frog.	Ex. 62 [Infowars Amended Answers to SAC, Dkt. 70] at ¶¶ 37–39; Ex. 63 [FURIE_INFO_00000989–00000992]; Ex. 15 [FSS000254–000258]; Ex. 22 [FSS000328–000338]; Ex. 64 [FSS000345–000352].
69.	The MAGA Posters depict Pepe the Frog's entire face.	Ex. 2 [Allen_Furie_0000033].
70.	The version of Pepe the Frog in the MAGA Posters displays Pepe's most prominent features, including his bulging eyes, three light-colored dots in the pupils, puffy eyelids, and red lips.	Ex. 2 [Allen_Furie_0000033]; Ex. 5 [Allen Dep. Tr. at 139:15–21].
71.	Alex Jones discussed this lawsuit on the March 6, 2018 episode of <i>The Alex Jones Show</i> .	Ex. 52 at FURIE_INFO_00001908–00001909, 4:13–5:10.

1	72.	Mr. Furie stated in a published	Ex. 65 at FSS000143.
2		interview with <i>esquire.com</i> ,	
3		published on September 28, 2016	
4		that “Pepe the Frog is copyrighted	
5		by me.”	
6	73.	Mr. Furie, in conjunction with the	Ex. 66 at FURIE_INFO_00000104.
7		Anti-Defamation League, issued a	
8		press release on October 14, 2016	
9		announcing a partnership to end	
10		the misappropriation of Pepe the	
11		Frog.	
12	74.	<i>Motherboard</i> , a subsidiary of <i>Vice</i>	Ex. 49 at FURIE_INFO_00001863;
13		<i>Media</i> , reported on August 28,	Ex. 69 at FURIE_INFO_00012027.
14		2017 that Mr. Furie “will	
15		aggressively enforce his	
16		intellectual property, using legal	
17		action if necessary, to end the	
18		misappropriation of Pepe the	
19		Frog.”	
20	75.	Mr. Furie issued a press release on	Ex. 50 at FURIE_INFO_00001472.
21		September 18, 2017 stating he	
22		“expanded his enforcement of his	
23		intellectual property rights in	
24		Pepe” by taking legal action	
25		against additional parties using	
26		images of Pepe the Frog.	

1	76.	Alex Jones hosted Mike	Ex. 51 [FURIE_INFO_00001890–
2		Cernovich on <i>The Alex Jones</i>	00001904]; Ex. 57 [Alex Jones Dep.
3		<i>Show</i> on September 17, 2017 to	Tr. at 33:9–20].
4		discuss a cease-and desist letter	
5		from Mr. Furie demanding that	
6		Mr. Cernovich stop using Pepe the	
7		Frog.	
8	77.	Mr. Furie’s inspiration for Pepe	Ex. 48 [Pl.’s Jan. 14, 2019 Response
9		the Frog and the other characters	to Interrog. 1].
10		in the <i>Boy’s Club</i> comic books	
11		were Mr. Furie’s family and	
12		friends.	
13	78.	Pepe the Frog was not inspired by	Ex. 48 [Pl.’s Jan. 14, 2019 Response
14		any literary or other character.	to Interrog. 1].
15	79.	El Sapo was not an inspiration for	Ex. 3 [Furie Dep. Tr. at 144:2–7].
16		Pepe the Frog.	
17	80.	Mr. Furie had never seen El Sapo	Ex. 3 [Furie Dep. Tr. at 144:4–5].
18		Pepe before this litigation.	
19	81.	Mr. Furie has never been to	Ex. 67 [Pl.’s Feb. 22, 2019 Response
20		Argentina.	to Interrog. 15]; Ex. 3 [Furie Dep. Tr.
21			at 124:16–22]; Ex. 4 at
22			FURIE_INFO_00000037.
23	82.	Mr. Furie never traveled to	Ex. 67 [Pl.’s Feb. 22, 2019 Response
24		Argentina or any other Latin	to Interrog. 15]; Ex. 3 [Furie Dep. Tr.
25		American country prior to creating	at 124:16–22]; Ex. 4 at
26		Pepe the Frog.	FURIE_INFO_00000037.

83.	Mr. Furie’s “Pepe in the Blue Shirt” is not identical to “El Sapo.”	Ex. 1 [FURIE_INFO_00000166]; Ex. 68 [Dkt. 71-2 at 2–3].
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II. PROPOSED CONCLUSIONS OF LAW

A. Infowars's "Implied or Explicit License" Defense Fails

1. To survive summary judgment on its affirmative defense of implied license, Infowars must identify evidence establishing a dispute of material fact on "the same elements necessary to evidence an express contract: mutual assent or offer and acceptance, consideration, legal capacity and lawful subject matter." *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1050–51 (9th Cir. 2015) (quoting 1 Richard A. Lord, *Williston on Contracts* § 1:5 at 37-38 (4th ed. 2007)). There are no genuine disputes of material fact precluding summary judgment on Infowars's implied license defense.

2. Infowars has failed to identify evidence that it received an offer for a license to Pepe the Frog. Nor has Infowars identified evidence that it accepted an offer for a license to Pepe the Frog. Without evidence that the parties mutually assented to the asserted license through offer and acceptance, Infowars's implied license defense fails. *Done! Ventures, LLC v. Gen. Elec. Co.*, 2011 WL 13217220, at *5 (C.D. Cal. Jan. 21, 2011) (mutual assent requires "an offer communicated to the offeree and an acceptance communicated to the offeror")

3. Infowars has failed to identify evidence that the alleged license between Infowars and Mr. Furie was supported by consideration. Without evidence of a bargained-for agreement imposing some obligation on Infowars, there can be no consideration and therefore no license. *Gemcap Lending I, LLC v. Crop USA Ins. Agency, Inc.*, 2014 WL 12589335, at *4 (C.D. Cal. Jan. 14, 2014) (no consideration where party "obtained no discernable benefit in return"); *Ormesher v. Raskin*, 2010 WL 11549656, at *2 (C.D. Cal. May 6, 2010) (consideration is a "required element to form a binding contract").

4. Even if an implied license existed between the parties, the license was revoked. *Kinney v. Oppenheim*, 2011 WL 13217573, at *4 (C.D. Cal. Mar. 3, 2011) (“[N]onexclusive licenses are revocable absent consideration.”) (quoting 3–10 Nimmer on Copyright § 10.02[B][5]). Mr. Furie’s sustained and public enforcement activities demonstrate that—if there were any license—he terminated it by at least September 28, 2016. *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 566 (S.D.N.Y. 1995) (summary judgment of copyright infringement where plaintiff’s enforcement activity demonstrated intent to terminate license).

B. Infowars’s “Abandonment or Forfeiture” Defense Fails

5. To survive summary judgment on its affirmative defense of abandonment, Infowars must identify evidence establishing a dispute of material fact that “there is an intent by the copyright proprietor to surrender rights in his work.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) (internal quotation marks omitted). Abandonment must be evidenced by “clear, decisive and unequivocal conduct” indicating intent, *Interscope Records v. Time Warner, Inc.*, 2010 WL 11505708, at *13 (C.D. Cal. June 28, 2010), and “must be manifested by some overt act indicative of a purpose to surrender the rights and allow the public to copy.” *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960) (emphasis added). There are no genuine disputes of material fact precluding summary judgment on Infowars’s implied license defense.

6. Infowars has not identified evidence of “clear, decisive and unequivocal conduct” indicating an intent to surrender Mr. Furie’s rights in Pepe. Mr. Furie’s comic books are marked with copyright notices. Mr. Furie has repeatedly asserted the copyrights in his works, through public statements, licensing to third parties, and legal action.

7. The media statements by Mr. Furie on which Infowars relies relate to derivative works of Pepe the Frog in internet memes and are not in reference to

Mr. Furie's copyrights or the commercial use of Pepe the Frog. Such statements cannot be construed as the type of unequivocal conduct evidencing an intent to abandon copyrights. *See Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960) (finding no abandonment where copyright owner did not give permission to sell copyrighted prints for commercial exhibition, even though copyright owner took no action for 25 years).

8. Infowars has failed to identify evidence that refutes Mr. Furie's affirmative statements and actions regarding his intent to maintain his copyrights in Pepe the Frog. *See, e.g., Dolores Press, Inc. v. Robinson*, 2019 WL 1223320, at *4 (9th Cir. Mar. 15, 2019) (affirming summary judgment in favor of copyright owner on claim of abandonment where copyright was enforced). Therefore, no genuine disputes of material fact exist regarding Infowars's abandonment defense and summary judgment should be entered in Mr. Furie's favor.

C. Infowars's "Lack of Copyright" Defense Fails

9. To survive summary judgment on its affirmative defense of lack of copyright, Infowars must identify evidence establishing a dispute of material fact that "[1] plaintiff had access to the prior work and [2] that plaintiff's work is substantially similar to the prior work in both ideas and expression." *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033–34 (9th Cir. 1992). There are no genuine disputes of material fact precluding summary judgment on Infowars's lack of copyright defense.

10. Infowars has failed to identify evidence that Mr. Furie had access to El Sapo. The uncontroverted evidence establishes that El Sapo was not an inspiration for Pepe the Frog in any way, that Mr. Furie never heard of or saw El Sapo until this litigation, and that Mr. Furie had never traveled to Argentina or any other Latin American country prior to creating Pepe the Frog. Infowars has

1 produced no evidence that refutes Mr. Furie's testimony, and therefore the lack of
2 copyright defense fails under the first element.

3 11. Infowars has also failed to identify evidence that Pepe the Frog is
4 substantially similar to El Sapo. Summary judgment for lack of substantial
5 similarity is appropriate when there are "insufficient objective similarities
6 between the works." *See Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d
7 1072, 1077 (9th Cir. 2006).

8 12. Contrary to Infowars's assertion, El Sapo and Pepe the Frog are
9 objectively distinct. El Sapo has none of Pepe the Frog's most common features:
10 puffy eyelids, red lips, and bulging eyes. These major visual differences are alone
11 enough to find that the characters lack substantial similarity. As a result, the two
12 characters cannot, as a matter of law, be substantially similar. *Florentine Art*
13 *Studio, Inc. v. Vedet K. Corp.*, 891 F. Supp. 532, 536 (C.D. Cal. 1995) (finding
14 lack of substantial similarity of plaster swan statues because defendant's
15 "differ[ed] from plaintiff's in the beak, which extends to the wings, in its larger
16 tail, and in the lines at the base")

17 **D. Infowars's "Invalid Certificate of Registration" Defense Fails**

18 13. To survive summary judgment on its affirmative defense of lack of
19 copyright, Infowars must identify evidence establishing that (1) Mr. Furie
20 knowingly applied for his Certificate of Registration No. VA0002074461 for
21 "Pepe in the Blue Shirt" with inaccurate information; and (2) that inaccurate
22 information would have caused the Copyright Office to refuse registration. 17
23 U.S.C. § 411(b)(1).

24 14. Infowars has identified no evidence that Mr. Furie's application for
25 "Pepe in the Blue Shirt" contained inaccurate information. The undisputed
26 evidence shows that Mr. Furie created a digital version "Pepe in the Blue Shirt" on
27

1 April 12, 2016, and that he submitted that with his copyright application. The
 2 interview statement on which Infowars relies does not state that Mr. Furie is not
 3 the creator of “Pepe in the Blue Shirt.” Nor could it, as it predates Mr. Furie’s
 4 creation of “Pepe in the Blue Shirt.”

5 15. Because Infowars has failed to identify evidence that Mr. Furie’s
 6 copyright application contained inaccurate information, its invalid certificate of
 7 registration defense fails.

8 **E. Infowars’s “*De Minimis* Use” Defense Fails**

9 16. To survive summary judgment on its affirmative defense of *de*
 10 *minimis* use, Infowars must identify evidence establishing that the MAGA poster’s
 11 use of the image and character of Pepe the Frog “is so meager and fragmentary that
 12 the average audience would not recognize the appropriation” of Mr. Furie’s
 13 copyrighted work. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986). There
 14 are no genuine disputes of material fact precluding summary judgment on
 15 Infowars’s *de minimis* use defense.

16 17. The image and character of Pepe the Frog is protected by Mr. Furie’s
 17 copyright in “Pepe in the Blue Shirt.”

18 18. The image and character of Pepe the Frog is protected by Mr. Furie’s
 19 copyrights in *Play Time* and the *Boy’s Club* comics. “[C]opyright protection
 20 extends not only to an original work as a whole, but also to ‘sufficiently
 21 distinctive’ elements, like comic book characters, contained within the work.” *DC*
 22 *Comics v. Towle*, 802 F.3d 1012, 1019–20 (9th Cir. 2015). The undisputed
 23 evidence shows that Pepe the Frog has “physical as well as conceptual qualities;”
 24 is “‘sufficiently delineated’ to be recognizable as the same character whenever it
 25 appears;” and is “especially distinctive,” with “unique elements of expression.”
 26
 27
 28

1 *DC Comics*, 802 F.3d at 1021. The image and character of Pepe the Frog is
2 therefore protected by copyright.

3 19. Infowars has failed to identify evidence that the use of Pepe the Frog
4 in the MAGA poster is so meager that the average audience would not recognize
5 the misappropriation. *Fisher*, 794 F.2d at 434 n.2. To the contrary, the artist who
6 created the first MAGA Poster intended Pepe the Frog to be recognizable. And
7 multiple Infowars customers, Alex Jones, and David Jones all recognized Pepe the
8 Frog in the MAGA Posters. Therefore, Infowars's *de minimis* use defense fails.

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Respectfully submitted,

2 By: /s/ Louis W. Tompros

3 **Wilmer Cutler Pickering Hale and**
4 **Dorr LLP**

5 Nancy Schroeder (SBN 280207)
6 350 S. Grand Ave. Suite 2100
7 Los Angeles, CA 90071
8 Tel.: (213) 443-5300
9 Fax: (213) 443-5400
10 nancy.schroeder@wilmerhale.com

11 Louis W. Tompros (*pro hac vice*)
12 Stephanie Lin (*pro hac vice*)
13 60 State Street
14 Boston, MA 02109
15 Tel.: (617) 526-6000
16 Fax: (617) 526-5000
17 louis.tompros@wilmerhale.com
18 stephanie.lin@wilmerhale.com

19 William C. Kinder (*pro hac vice*)
20 7 World Trade Center
21 250 Greenwich Street
22 New York, New York 10007
23 Tel.: (212) 295-6509
24 Fax: (212) 230-8888
25 will.kinder@wilmerhale.com

26 *Attorneys for Plaintiff*
27 MATT FURIE
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